STATE OF MICHIGAN
IN THE SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Appellee,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Appellant.
_____/

Michigan Supreme Court No. 123833

Court of Appeals No. 237471

Court of Claims No. 00-17592-CM

APPELLANT MICHIGAN DEPARTMENT OF TRANSPORTATION'S SUPPLEMENTAL BRIEF

123833

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Dated: February 13, 2004

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INTRODUCTION

This brief responds to this Court's Order of January 16, 2004, to supplement the Application for Leave to Appeal filed by the Michigan Department of Transportation (MDOT) and to address points made in the Brief in Opposition to Application for Leave to Appeal filed by Appellee, Boddy Construction Company, Inc. (Boddy).

By Order of January 16, 2004, this Court directed the Clerk to schedule oral argument on whether the Court should grant MDOT's Application for Leave to Appeal or take other peremptory action permitted by MCR 7.302(G)(l). The parties were specifically instructed to include the following among the issues to be addressed, and were permitted to file supplemental briefs:

> (1) Whether, in response to defendant's motion for summary disposition, plaintiff presented any admissible evidence to support its claim for additional compensation; and
>
> (2) Whether plaintiff presented sufficient evidence that defendant waived compliance with the Notice of Claim section of the 1990 Standard Specifications for Construction contract, specifically § 1.05.12, to create a genuine issue of material fact on that question.

MDOT's Application for Leave to Appeal asserted that Boddy: (1) had not presented any admissible evidence to support its claim for additional compensation, and (2) had not presented sufficient evidence that MDOT had waived compliance with the notice provision to create a genuine issue of material fact. Without repeating all that MDOT set forth in its Application for Leave to Appeal, this supplemental brief will advert to those arguments and recitations of the record, and address Boddy's responsive brief.

ARGUMENT

I. Boddy failed to present any admissible evidence to support its claim for approximately $737,955 in additional compensation

MDOT addressed this issue at pages 20-28 of its Application for Leave to Appeal. MDOT quoted the testimony of the owner of Boddy, Horace Boddy, and his project engineer for this contract, John Zimmer. Mr. Zimmer testified that he regularly kept records of any claim for additional compensation that arose during the course of the project, as the following excerpt from that testimony reveals:

> When an issue would come up, it may or may not involve additional work or additional costs. **If there is any question at all that we couldn't resolve it immediately, I would keep notes or records of some sort**. I may note it in this Franklin planner or, if it involved actual time and hours, I kept a force account record. Whether we used it or not as a force account, I would keep a force account record. [Emphasis added; John Zimmer Deposition, p 21; Ex 11 of MDOT's Additional Documentation in Support of Summary Disposition.]

No such records were ever produced for the claims at issue in this lawsuit. Moreover, Mr. Boddy expressly negated the existence of any evidence to support Boddy's claimed damages, when he was questioned at his deposition:

> Q. **Do you have any documentation to support the amount that you asked for in the complaint?**
>
> A. **No, I don't. I have it pretty well in my head** and I did that by how many nights -- or roughly how many nights went out there and. Everything, **but then since the Complaint has been written I kind of let that slip out of my mind.** [Emphasis added; Horace Boddy Deposition, p 53-54; Ex 12 of MDOT's Additional Documentation in Support of Summary Disposition.]

Despite that admission by Mr. Boddy, the Court of Appeals indicated that there was testimony by Mr. Boddy regarding certain handwritten notes that would support the claim of damages:

> [W]e note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37. [*Boddy v MDOT*, unpublished opinion per curiam of the Court of Appeals decided February 28, 2003 (Docket No. 237471), p 3]

It is true that Mr. Boddy referred to such handwritten notes in his deposition testimony, but those notes were never produced in the trial court; Mr. Boddy admitted that they probably no longer existed. Thus, Mr. Boddy testified:

Q. The next amount in the Complaint, paragraph 11, is a request for additional compensation for the cost to excavate and dispose of temporary aggregate off site in the amount of $91,407.37. How did you calculate that number?

A. The truck drivers used to turn in load tickets to me or tell us what to use to do it, and I don't know if those tickets are still around or not, but that was with – that was contaminated stone. The stone was supposed to be originally set up and the same underneath concrete. It got contaminated and it was not even good for driveways, it made mud every time it rained and that's where that stone is.

Q. And how did you come up with the $91,000 figure?

A. We figured how many times – the trucks are worth so much an hour and the machines worked so much an hour and the operator works so much an hour, the truck driver works so much an hour, and I come up with that figure on the pad, just think of one night, and I don't know if that hand scratching is even around.

Q. **Is that figure $91,407.37 supported by any documentation?**

A. **I don't know if it is still around**, Dave, or not.

Q. The documentation – that you are not sure whether it is around or not, what would that be?

A. Just a yellow pad.

Q. **Your handwritten notations?**

A. **Handwritten notations.** [Emphasis added; Horace Boddy Deposition, pp 93-94; Ex 11 of MDOT's Additional Documentation in Support of Summary Disposition.]

If any such notes existed, Mr. Boddy had an obligation to produce them to the trial court before it decided MDOT's motion for summary disposition under MCR 2.116(C)(10). Even a promise to produce records, much less, as here, silence on the subject, is not sufficient to create a genuine issue of material fact. As this Court stated in *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999):

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

Without regard to Boddy's claim that MDOT somehow waived the notice requirement, no substantively admissible evidence was presented to the trial court to create a genuine issue of material fact as to whether Boddy could prove its claimed damages. As the trial court stated: "Plaintiff cannot provide any records that they kept to demonstrate the amount of the additional compensation." [Trial Court Opinion, p 8]

II. The contract unambiguously requires that a contractor give written notice of its intention to file a claim for additional compensation before beginning the work or, with an inapplicable exception, the claim will be barred; Boddy failed to present sufficient substantively admissible evidence to create a genuine issue of fact on its claim that MDOT waived the notice requirement

It is undisputed that Boddy did not give MDOT written notice of its intention to claim additional compensation until many months after the work was completed, contrary to the clear and unambiguous terms of section 1.05.12.a. of the Standard Specifications:

> **a. Notice of Claim.**-- If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, **the Contractor**

> **shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim** or the Contractor shall notify the Engineer within 24 hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based.
>
> * * *
>
> **Failure of the Contractor to give such notification** or to afford the Engineer proper facilities for keeping strict account of actual cost of the work or delay upon which the notice of intent to file claim was made **will constitute a waiver of the claim for such extra compensation** or extension of contract time **unless such claims are substantiated by Department records and the extra costs were unforeseeable.** [Emphasis added.]

The unrebutted affidavit of MDOT's project engineer, Ralph Langdon, states that Boddy's claims were neither substantiated by MDOT records nor unforeseeable. Thus, the exception to the notice requirement is not applicable to the claims that Boddy pursues in this litigation. Accordingly, unless MDOT somehow waived the requirement, the claims are barred.

In *Quality Products and Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 364-365; 666 NW2d 251 (2003) this Court set forth the burden that a party must surmount to show a waiver of the clear and unambiguous provisions of a contract:

> [T]he freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement. Rather, **a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract.**
>
> * * *
>
> The mutuality requirement is satisfied where a modification is established through **clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract.** In meeting this clear and convincing burden, **a party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract** . . . .[Emphasis added]

MDOT addressed this subject at pages 14-19 of its Application for Leave to Appeal. Since, in the Court of Appeals, Boddy had relied on the meaning of an alleged "Charter," MDOT's Application for Leave to Appeal showed how no such document was

ever presented to the trial court, and how the contract negated any possibility that the Charter could have modified the terms of the contract. (Application for Leave to Appeal, pp 14-15). Boddy has apparently abandoned this line of argument, as it does not appear in the Brief in Opposition to Application for Leave to Appeal. Instead, Boddy attempted to bolster the absence of any record evidence of waiver by relying on pre-*Maiden* case law as establishing the standard under which an MCR 2.116(C)(10) motion for summary disposition is to be considered. At pp 1-2 of its Brief in Opposition to Application for Leave to Appeal, Boddy quoted *Stehlik v Johnson*, 204 Mich App 53, 55; 514 NW2d 508 (1994):

> [T]he trial court must give the benefit of reasonable doubt to the nonmovant and determine **whether a record might be developed** that would leave open an issue upon which reasonable minds could differ. [Emphasis added; citations omitted]

Maiden, supra overruled that line of analysis, as shown in the above quotation from *Maiden.* The nonmovant must actually produce the evidence necessary to establish a genuine issue of material fact; the mere possibility that such a record "might be developed," is plainly insufficient.

To comply with the burden to establish waiver, as set forth in *Quality Products, supra*, Boddy quoted testimony from the deposition of Ralph Langdon, MDOT's project engineer. As shown by the excerpt quoted by Boddy, Mr. Langdon was asked to address eight to ten claims that Boddy abandoned, or MDOT worked out with Boddy:

> Q. **With regard to the eight or ten claims that the contract[or] either abandoned or you were able to work out and compromise, do you know if those claims procedures were strictly adhered to?**
>
> A. **Maybe not strictly adhered to. They were possibly adhered to loosely.** Most of the time on extra work if the contractor encountered something on a project that we didn't anticipate he's

> not gonna stop work. He's gonna keep working and accept— expect to get extra payment for. Now, normally— [Emphasis added; Defendant's Response to MDOT's Motion for Summary Deposition, Ex F, Ralph Langdon Deposition, pp 39-40]

Mr. Langdon was **not** asked if he told Boddy that it need not file a notice of intent to file a claim to preserve any right to additional compensation where MDOT did not order the performance of extra work. As a result, any claim that Mr. Langdon's testimony documents an MDOT waiver requires reading words into the testimony that Mr. Langdon did not utter.

MDOT addressed the above-quoted testimony by Mr. Langdon in its Application for Leave to Appeal, pp 17-19. MDOT cited an affidavit by Mr. Langdon that explained, while it is true that MDOT did not enforce the notice requirements as to certain of those eight to ten claims, the reason was that Mr. Langdon was able to satisfy himself that there were sufficient MDOT records to substantiate the claims:

> 8. Upon completion of the Project, Plaintiff set forth 15-16 claims for additional compensation. It is important to note that Plaintiff failed to provide written notice of any of the 15-16 claims before beginning the work upon which the claim was based.
>
> 9. Of the 15-16 claims Plaintiff set forth for the first time after completion of the work, Plaintiff either withdrew the claims or I agreed to tender additional compensation on all but 6 of the claims.
>
> 10. I agreed to tender additional compensation on some of Plaintiff's claims despite the fact that Plaintiff had failed to provide written notice as required by 1990 Standard Specification 1.05.12 because the claims were substantiated by Department records and the extra costs were unforeseeable. [MDOT's Motion for Summary Disposition, Ex B, Ralph Langdon Affidavit]

Boddy's Brief in Opposition to Application for Leave to Appeal did not attempt to explain how Mr. Langdon's reference to loose adherence to the Specifications for those

eight to ten claims equates with a waiver of the requirement that a contractor give timely written notice of its intention to file a claim for additional compensation.

It appears that Mr. Langdon's deposition testimony may have also pertained to circumstances in which a contractor is ordered to perform extra work. Just prior to the above-quoted question and answer, Mr. Langdon had been asked about sections 1.09.04 and 1.09.05 of the Standard Specifications (Langdon Deposition, Ex 2). Those sections pertain to payments for increased or decreased quantities, and for extra work that is required by MDOT. Section 1.09.05 provides that the MDOT Engineer may order the performance of extra work, and that:

> Payment for such work will be on the unit price or lump sum basis agreed to in the Authorization. When such agreement cannot be reached, the Engineer may order such work, including any required offsite work, to be done by force account.

The questions and answers of Mr. Langdon, just after the above quoted exchange suggest that, in part, Mr. Langdon may have had reference to the procedures for trying to agree upon a price for extra work under section 1.09.05:

> Q. That's generally speaking –
>
> A. Right.
>
> Q. -- the way it goes, right?
>
> A. Right. Normally, you know, we don't know how much it's gonna cost. The contractor doesn't know how much it's gonna cost. So we – even though we agree that the contractor is gonna get reimbursed, we don't really know how much. So we try to keep records of what he does so at a later date we can pay him, even though it's not a claim. It's just extra work. [Defendant's Response to MDOT's Motion for Summary Deposition, Ex F, Ralph Langdon Deposition, p 40]

That testimony appears to be addressed to circumstances in which a contractor is directed to perform extra work under section 1.09.05, but rather than agree on the price

that will be paid, in some instances, they simply "keep records of what he does so at a later date" the contactor can be paid. That would appear to represent a loose adherence to section 1.09.05 by leaving to a later time the decision whether to pay a negotiated price or pay by force account – instead of specifying which method of payment will be used at the time the contractor is ordered to perform the extra work. That is a plausible reading of some of Mr. Langdon's testimony, given the context in which he was questioned. But, the testimony is not clear. The only thing that is clear about the testimony is that his reference to "loose adherence" to the procedures was made in the context of his attention having been drawn to sections 1.09.04 and 1.09.05 – provisions having nothing to do with section 1.05.12, the section that requires the filing of timely written notice of claims for extra compensation.

Boddy has cited no testimony by Mr. Langdon to the effect that he waived compliance with the notice requirements of section 1.05.12.

Boddy also argues in its Brief in Opposition to Application for Leave to Appeal, p 8, that MDOT's District Construction Engineer's May 19, 1997 letter setting forth the first-level MDOT decision on some of the claims, did not raise the failure to give notice and even approved two of the claims that are now in dispute – but for an apparently unacceptably low level of compensation. Of course, that claims decision was rendered long after Boddy had completed the work for which Boddy was claiming a right to additional compensation. It would be chronologically impossible for Boddy to have decided not to submit a timely written notice of intent to file a claim because somehow, many months after the alleged claim arose, MDOT would implicitly "waive" the notice requirement for two claims. That just makes no sense.

Finally, Boddy's Brief in Opposition to Application for Leave to Appeal states that Boddy testified that "although he was never specifically told that the notice of claim requirement was waived, he was told that the issues regarding extra compensation would be resolved later since it was important to get the project done." In support of that assertion, Boddy cited three pages of Mr. Boddy's deposition testimony, pp 57, 62 and 68.

At page 57 Mr. Boddy testified that he was told that "we'll take care of it at a later date" in the context of his objections to doing certain work:

> A. . . . So then he wants us to banana knife, cut like a banana in the fabric, so – for the wire they were getting in the trenches. And then it was Gene's idea to install ten feet of fabric behind the drain tile.
>
> Q. Okay.
>
> A. And at the time I said, show me where it is, how you are going to pay me for it, and we will do it. He says, we'll take care of it at a later date. I said, that's not what the plans were. So they went and got a set of plans. I said, where does it show you that. And I never have been paid for that fabric as of today. And MDOT don't work that way, MDOT pays you for what you do. [Defendant's Response to MDOT's Motion for Summary Deposition, Ex B, Horace Boddy Deposition, p 57]

Accepting as true Mr. Boddy's account of the exchange, it is impossible to construe it is a knowing and intentional waiver of the contractual obligation of the contractor to file a timely written notice of a claim for additional compensation. The strongest statement in terms of showing waiver is: "we'll take care of it at a later date." But the testimony does not show what that meant. Boddy would read between the lines to suggest that it was an acknowledgement of Boddy's right to additional compensation and a promise to later pay that compensation. But that cannot be a valid interpretation since it conflicts with the very next sentence indicating that Mr. Goglin then went to get

the plans to show whether the plans called for the work in question (in which event there would be no basis for any claim for additional compensation). If Mr. Goglin had just promised to pay Boddy additional compensation, it would make no sense to continue disputing Boddy's entitlement to additional compensation.

At page 62 Mr. Boddy provided incomprehensible testimony about Mr. Langdon and Noel Smith telling him "they would take care of it at a later date, that they were confused on how it was":

> Q. When you told Gene Goglin in September of '95 that you were going to have a claim over this item, who else was present?
>
> A. I don't think nobody was present at that meeting. But then there was another meeting that come up with Noel Smith, and also Ralph Langdon, and I – they told me that they would take care of it at a later date, that they were confused on how it was. If Gene wanted it out there, put it out there for the time being. So that's the way we started." [Defendant's Response to MDOT's Motion for Summary Deposition, Ex B, Horace Boddy Deposition, p 62]

It is impossible to discern from that account just who said what, or to what they were referring.

Finally, at the cited p 68 there appears to be a clear statement by Mr. Boddy that he was told that he need not file a notice of claim:

> Q. **Did anyone from MDOT tell you or anyone else from Boddy that Boddy did not have to file a Notice of Claim in this case?**
>
> A. **Yes,** Gene Goglin – Ralph Langdon did, Noel Smith told me, and even Jim Hansen after he come aboard for Noel Smith also said it is too far along, we don't have a Notice of Claim.
>
> Q. When Jim said that, the work had already been completed, correct?
>
> A. No, we were still out there on that project.
>
> Q. Had the work already began on which the claims were based?

A. Yes. [Defendant's Response to MDOT's Motion for Summary Deposition, Ex B, Horace Boddy Deposition, p 68]

The first part of the first answer would appear to be a clear affirmative answer, showing that MDOT representatives told Mr. Boddy that he need not file a notice of claim, albeit in some unexplained circumstance. In subsequent responses Mr. Boddy recanted that very definitive statement, as will hereafter be shown. But first, it should be noted that with regard to Mr. Hansen, he was alleged to have told Mr. Boddy: "it is too far along, we don't have a Notice of Claim." Mr. Boddy then admitted that the work to which Mr. Hansen was referrring had already begun, though it had not been completed. Certainly, Mr. Hansen could not have waived the requirement that, before the work is begun notice must be given, by a statement made after the performance of the work was "too far along."

Those three page references are the evidence on which Boddy relies to show a waiver of the notice requirement. Not one of them – nor all of them considered together – could begin to create a genuine issue of fact as to whether Boddy can show:

> **clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract**. In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract . . . . [469 Mich at 365; Emphasis added]

Finally, Boddy simply cannot avoid the fact that at p 75 of that same deposition, Mr. Boddy was probed on whether records of the meetings at which those alleged statements were made would bear out his account of them, and he testified:

Q. And the tape recordings that you kept of these meetings, it would have included these conversations you have just described for me where Gene Coglin, Bob Tiera, Noel Smith and Jim Hensen state that a Notice of Claim is not required?

A. **I don't think they came out and said a Notice of Claim was not required**, I think they came out and said no notice has to be given and we are going to keep up to you, we are going to keep track of the time and pay you in some way, or in some kind of language like that. I don't think a Notice of Claim as you are saying it ever was really – came out and say you don't have to file a Notice of Claim, **they have always beat around the bush with it**.

Q. **Did you ask them to clarify it**?

A. **No**, I did not. [Defendant's Response to MDOT's Motion for Summary Deposition, Ex B, Horace Boddy Deposition, p 75]

Boddy's project engineer, Mr. Zimmer, testified to the routine he and the MDOT representatives would follow when a claim arose. Application for Leave to Appeal, pp 25-27. He would keep records of the work and costs, and compare his records with MDOT's records when there was a disagreement. With specific regard to whether the notice requirement was "waived" by MDOT, Mr. Zimmer testified:

Q. Mr. Zimmer, did you have any conversations with anybody from MDOT regarding the necessity of filing a written Notice of Claim?

A. I may have late in the game, towards the end of the project. I can't say that I definitely recall.

Q. Would that conversation, if one did occur, would that have occurred after the work was finished?

A. Oh, yes.

Q. **Did you ever overhear anyone from MDOT make any statements regarding the requirement of filing a written Notice?**

A. **Though [sic], I don't think so.**

* * *

Q. **I take it from your prior answer then, that you have never heard anybody from MDOT say that written Notice of an intent to file a claim was not required on this job; is that correct?**

A. **I never heard -- they never told me that it wasn't required, that would be correct, they have never told me that.** [Emphasis added; Zimmer Deposition, pp 61-62; Exhibit 11 of MDOT's Additional Documentation in Support of Summary Disposition.]

Boddy may not now dispute that unrebutted testimony of its own project engineer by reading words into deposition testimony.

CONCLUSION

After hearing oral argument on MDOT's Motion for Summary Disposition, the trial court gave each party until the end of the week to file any documents on which they were relying for their respective positions. MDOT filed a collection of additional documents (MDOT's Additional Documentation in Support of Summary Disposition). If Mr. Boddy had been told by MDOT that he need not file notices of intent to file claims – or if MDOT had otherwise communicated a waiver of the requirement – Boddy was required to file an affidavit or other evidence with the trial court. Boddy filed nothing. The record before the trial court, when it granted MDOT's motion for summary disposition, did not contain sufficient evidence to create a genuine issue of material disputed fact as to whether MDOT had waived the contractual notice requirement.

Finally, it is important to bear in mind three points concerning the notice requirement: (1) giving notice of intention to file a claim is a simple step for the contractor to take, requiring no cooperation from MDOT to take it; (2) Boddy's project engineer actually managed the project for Boddy and followed the procedures with no one ever suggesting that he need not give timely written notice of claims; and (3) enforcement of the requirement is essential if MDOT is to perform its responsibility to address and mitigate problems when they arise, and to keep contemporaneous records if

necessary. MDOT asks for no more than enforcement of the plain and unambiguous terms of the contract.

RELIEF

WHEREFORE, MDOT asks that this Honorable Court peremptorily reverse the decision of the Court of Appeals and affirm the trial court's decision granting summary disposition in favor of MDOT, or, in the alternative, grant MDOT's Application for Leave to Appeal.

Respectfully submitted,

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Dated: February 13, 2004
2000052938C/Supplemental Brief

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PROOF OF SERVICE

On February 13, 2004, a copy of Appellant's Supplemental Brief, in the above-captioned matter, in a sealed envelope and addressed to:

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was deposited by the undersigned via U.S. mail.

Cindy Sundquist Smoke

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February 13, 2004

Clerk of the Court
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Lansing, MI 48909-7522

Dear Clerk:

Re: *Boddy Construction Company, Inc v MDOT*
Supreme Court No. 123833
Court of Appeals No. 237471
Lower Court No. 00-17592-CM

Enclosed for filing please find an original and seven (7) copies of Appellant MDOT's Supplemental Brief and Proof of Service regarding the above matter.

Thank you for your assistance.

Very truly yours,

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Enclosures
cc: Lawrence M. Scott
lit/2000/2000052938C Lclerk2